Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications International, Inc.	)	**WC Docket No. 02-148**
	)	
Consolidated Application for Authority To Provide In-Region, InterLATA Services in Colorado, Idaho, Iowa, Nebraska And North Dakota	)	

OPPOSITION OF TOUCH AMERICA, INC.

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Summary of the Argument

On its face, Qwest's Application must be denied. A cornerstone of the Telecommunications Act of 1996 (the "Act") – and a fundamental prerequisite to a finding of an "open" local exchange market and the approval of an application under section 271 of the Act – is the requirement of the Bell Operating Companies ("BOCs") to provide non-discriminatory access to unbundled network elements ("UNEs"). Despite this statutory mandate, Qwest's Application is replete with accounts of Qwest's failure to provide UNEs at parity or in accordance with the applicable performance measurements. While Qwest seeks to turn its report of performance results on its head in an attempt to convert its habit of sub-performance into isolated "misses," the data show that Qwest routinely failed to provide UNEs to its competitors at parity or to meet the requisite performance standards.

Qwest fails to provide non-discriminatory access to its databases and systems. Since Qwest purportedly divested its in-region, interLATA services and customers to Touch America, Qwest has failed to provide Touch America access to the databases, systems and facilities required to offer services to its customers. Qwest also discriminates in favor of its 272 affiliate and against Touch America and other competitors with respect to customer and circuit information in Qwest databases, in violation of section 272 of the Act. Further, Qwest contrived its billing processes to frustrate any reasonable accounting of costs and expenses. Touch America's first-hand experiences with Qwest in this regard are telling signs of Qwest's lack of openness to full and fair competition – whether the relevant marketplace is the long distance or the local exchange marketplace. For these reasons alone, Qwest's Application must be denied.

However, unlike prior 271 applications that have come before the Commission, it may be Qwest's "extracurricular" 271 activities – activities that directly affect the level of competition in the local and long distance markets – that most strongly compel the rejection of the Application. Over six years ago, the BOCs bargained to be let into the long distance markets once they could demonstrate that they had opened their local markets to competition. Since that time, Qwest has repeatedly sought out ways to circumvent the process by engaging in prohibited in-region, long distance activities. While the Commission put an end to such activity in at least three instances, Qwest has persevered to continue to provide in-region, interLATA services in the form of "lit capacity IRUs," supposed "corporate communications" and through advanced technologies and other artifices designed to sneak its way into the long distance marketplace before receiving authority to do so.

Qwest does not deny providing these services, but attempts to re-characterize them so as to take them outside of the 271 proscriptions. For instance, despite the fact that Qwest's lit fiber IRUs are clearly prohibited, in-region, interLATA services, Qwest has likened the service to "UNEs." While Qwest's characterization of the lit fiber IRUs is nothing more than a ruse to circumvent the 271 process, it does call into question Qwest's section 251 and 252 obligations to its competitors with respect to such UNEs in the context of this Application. Moreover, as section 271 of the Act prohibits a Bell Operating Company or its affiliate from providing in-region, interLATA services without Commission approval, Qwest cannot hide its 271-prohibited activities behind its 272 affiliate. In sum, despite Qwest's history of circumventing the 271 process, Qwest now comes before the Commission seeking statutory relief from the very statute that it has been violating all along.

Qwest's Application is also not in the public interest. Over the past several years, Qwest has engaged in a campaign designed to stamp out competition and silence its critics. Although Qwest was required to divest its in-region, interLATA assets to Touch America, Qwest has not only denied Touch America access to such assets but has retained rights to the assets in an effort to "park" the assets pending 271 approval. Furthermore, Qwest's interference with and control over the 271 compliance audit, essentially rendering Arthur Anderson a shill of Qwest, and the "secret" agreements that Qwest entered into with CLECs to silence their objections to Qwest's 271 applications, demonstrate the lengths that Qwest will go to to avoid having to play by the rules of the game. Despite Qwest's attempts to conceal its deficiencies and hush its opposition, the record clearly demonstrates that Qwest has failed to meet the 271 checklist requirements and that its discriminatory and anti-competitive conduct and efforts to jumpstart its entry into the long distance market renders approval of the Application wholly contrary to the public interest.

For these reasons, the Commission should deny the Application or condition any approval on the outcome of the 271 issues raised in this Opposition.

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OPPOSITION OF TOUCH AMERICA, INC.

Pursuant to the Public Notice issued in the above-referenced proceeding, Touch America, Inc. ("Touch America") hereby opposes the Consolidated Application ("Application") of Qwest Communications International, Inc. ("Qwest") for authority to provide in-region, interLATA services in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota.

Not only has Qwest failed to meet the 271 checklist requirements, but its anti-competitive conduct and disregard for the 271 process since the passage of the Telecommunications Act of 1996 (the "Act") has allowed it to unlawfully gain a jumpstart in the long distance marketplace. Qwest therefore comes before the Commission with "dirty hands" to the disadvantage of its competitors and the detriment of the public. For that reason alone, much less the failure to meet the 14-point checklist of 271, the Commission must deny the Application. In the alternative, the Commission should delay and condition any grant of authority on the resolution of the issues raised by this Opposition.[1]

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[1] In conformance with Commission precedent, Touch America raised these matters before the state regulatory commissions before bringing them before the Commission. Because the (*footnote continued on the next page*)

I. Introduction and Summary

Quite aside from the Track A and 14-point checklist that the Commission typically looks to in the context of 271 applications, this 271 Application is entirely different from those that have gone before it. Never has a Bell Operating Company ("BOC") seeking authority to offer in-region, interLATA services pursuant to section 271 of the Act come before the Commission so heavily tarnished with allegations of violating the very section of the Act under which it seeks relief. Indeed, Qwest has regularly undertaken activities designed to skirt the 271 proscriptions on an almost annual basis since 1997. On three previous occasions, the Commission found Qwest in violation of section 271: (1) the provision of 1-800-4USWEST service;[2] (2) the teaming arrangement between U S WEST and Qwest;[3] and (3) U S WEST's offering of National Directory Assistance.[4] Further, Qwest has avoided a meaningful audit of

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issues were first raised in Touch America's complaints filed with the Commission (*see supra* n.12), the state regulatory authorities found that the matters were better left to resolution by the Commission. For instance, the Idaho Public Utilities Commission found that "[a]s it is for the FCC to determine whether Qwest will be granted interLATA service authority, it is for the FCC to determine the validity of Touch America's complaints and their effect, if any, on Qwest's FCC application for interLATA authority." *See In the Matter of U S West Communications, Inc.'s Motion for an Alternative Procedure to Manage its section 271 Application*, Case No. USW-T-00-3, Commission Final Decision on Qwest Corporation's Compliance with section 271 at 8 (June 10, 2002). While Qwest may argue that Touch America improperly delayed bringing these issues to the attention of state regulatory authorities, Touch America in fact did so as soon as certain uncontested facts were confirmed and admissions by Qwest were made at the Commission.

2 *See In the Matter of AT&T Corp. v. U S WEST Communications, Inc., and MCI Telecommunications Corp. v. U S WEST Communications, Inc.*, File Nos. E-97-28 and E-97-40A, DA 01-418 (rel. Feb. 16, 2001) (prohibiting 1-800-4USWEST service).

3 *See In the Matter of AT&T Corp. v. Ameritech Corp. and Qwest Communications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 21438 (1998) ("*Teaming Order*"), *aff'd sub nom.*, *U S WEST Communications, Inc. v. FCC*, 177 F.3d 1057 (D.C. Cir.), *cert. denied,* 120 S. Ct. 1240 (1999).

4 *See MCI Telecommunications Corp. v. U S WEST Communications, Inc., and MCI Telecommunications Corp. v. Illinois Bell et al.*, Memorandum Opinion and Order, DA 99-2479 (*footnote continued on the next page*)

its efforts to comply with section 271 and over the past several years Qwest has entered into "secret agreements" with CLECs, essentially promising to live up to its statutory obligations, but only if the CLECs abandoned their opposition to Qwest's 271 applications.[5] Aggravating matters, Qwest has continued to provide in-region, interLATA services in violation of section 271 in the form of "lit capacity IRUs," supposed "corporate communications," advanced technologies and other artifices and by its failure to fully relinquish control over the provisioning of other in-region, interLATA services.[6]

What Qwest apparently fails to appreciate is a simple concept: a BOC is not permitted to offer long distance service until the FCC grants it approval to do so and, further, that the 271 process should be the product of full disclosure. By paying only lip service to the 271 process, while all the time engaging in 271 prohibited activities and silencing its critics, Qwest has thumbed its nose at the regulators, its competitors and consumers. Qwest now asks the Commission to sanction its behavior by granting it 271 relief even though it has already acted as if that relief had been granted.

(rel. Nov. 8, 1999) (declaring unlawful U S WEST's National Directory Assistance offering).

[5] For example, in a June 24, 2002 letter from J. Jeffrey Oxley of Eschelon Telecom, Inc.("Eschelon") to Commissioner Marc Spitzer of the Arizona Corporation Commission, Eschelon explains that "Qwest would not agree to develop a plan to address pressing service quality and other problems unless Eschelon dropped its opposition to Qwest's 271 bid." In addition, the Minnesota Department of Commerce filed a complaint against Qwest before the Minnesota Public Utilities Commission alleging that Qwest's "secret" CLEC agreements violate sections 251(c), 252(a)(1) and 252(e) of the Act. *See In the Matter of the Complaint of the Minnesota Department of Commerce against Qwest Corporation*, Verified Complaint, Minnesota Public Utilities Commission Docket No. P-421/DI-01-814 (Feb. 14, 2002).

[6] Although Qwest has attempted to hide certain of its 271 restricted activities and assets in its 272 affiliate, Qwest Communications Corporation ("QCC"), as discussed below in section II.B.1, pp. 14-15, it is nothing more than a shell game that violates section 271 and the non-discrimination requirements of section 272.

As the purchaser of Qwest's in-region, long distance business, Touch America is uniquely positioned to comment on Qwest's Application. The merger with U S WEST required Qwest to divest itself of all in-region, interLATA customers and services and to cease using its in-region assets and facilities to provide prohibited in-region, interLATA service. On March 8, 2000, the Commission initially approved the merger between U S WEST and Qwest. Final merger approval, however, was conditioned on Qwest's divestiture of its interLATA services and customers in the 14-state U S WEST region in order to bring the companies into compliance with section 271 prior to merging.[7] Pursuant to its April 14, 2000 Final Report on Divestiture ("Divestiture Report"), Qwest purported to fully and irrevocably divest its in-region, interLATA customers, as well as the facilities needed to serve them, to Touch America. Based on Qwest's representations and commitments in Qwest's Divestiture Report, the Commission, on June 26, 2000, approved Qwest's divestiture plan and paved the way for consummation of the merger four days later.[8]

As the Commission knows and approved as part of Qwest's divestiture, Touch America had to rely on Qwest and its operational support systems ("OSS") and personnel during an approximately two-year divestiture transition period. Touch America's reliance on Qwest was necessitated in much the same way CLECs must rely on Qwest when attempting to break into the local exchange market. During this time, at each turn, Touch America was met with obstruction,

[7] *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, *Memorandum Opinion and Order*, 15 FCC Rcd. 5376 (2000) ("*Merger Order*").

[8] *In the Matter of Qwest Communications International Inc. and U S WEST, Inc. Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Applications to Transfer Control of a Submarine Cable Landing License*, (*footnote continued on the next page*)

obfuscation and straight-out refusal to provide the services and facilities needed to service in-region customers. For instance, although Qwest was required to provide Touch America access to certain Qwest databases and systems necessary for Touch America to service the divested customers, Qwest, without reason or justification, restricted Touch America's access to such databases and systems, thereby impeding Touch America's ability to provide customer care service and to properly and accurately manage its costs and revenues. Qwest has also limited access to the switches that it leased to Touch America as part of the divestiture, making it effectively impossible for Touch America to manage and control its network.

As yet another example, Qwest has demonstrated its willingness to misuse the billing processes for the multitude of services it has provided to Touch America. For the first few months after divestiture, Qwest failed even to send either bills or payments to Touch America, thereby prohibiting Touch America from tracking its costs and revenues or managing its network. When Qwest finally sent spurious bills that Touch America was forced to dispute, Qwest simply retaliated by cutting off hundreds of essential services to Touch America. The impact of Qwest's billing practices has adversely affected Touch America's reputation with, as well as its ability to service, its customers. As a result, Touch America has been required to expend tremendous amounts of time, effort and money to correct and litigate the problems directly tied to Qwest's billing practices.

Touch America's experiences with Qwest are telling signs of Qwest's lack of openness to full and fair competition – whether the relevant marketplace is the long distance or the local

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Memorandum Opinion and Order, 15 FCC Rcd. 11909 (2000) ("*Divestiture Order*").

exchange market.[9] Touch America's experiences with Qwest also reveal that Qwest will use the regulatory process to win approval, but quickly backslide on promises, representations and commitments made to the Commission and competitors. The Commission must take Touch America's experiences with Qwest, and Qwest's proven track record, into consideration as it examines Qwest's Application.[10]

Moreover, by engaging in prohibited activities, Qwest has essentially "parked" its in-region, interLATA assets and has less of an incentive to open, and keep open, its local markets. That is, if Qwest already provides the services for which it seeks authority, why does it care whether it is meeting the conditions for obtaining approval of the authority? The incentive to resist its local market opening obligations can only become greater once Qwest receives 271 authority, as Qwest will be in a position to increase its anti-competitive efforts to the detriment of competition and consumers. Indeed, once Qwest is permitted to "bundle" services by

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9 Touch America's interest in this proceeding also lies directly as a competitive local exchange carrier ("CLEC"). Indeed, Qwest identifies Touch America as one of the number of CLECs operating in North Dakota which Qwest relies upon as support that it has met "Track A" of section 271. *See* Qwest Application, Exhibit DLT-TRACKA/PI-ND-1, North Dakota Wholesale Volumes Data Report.

10 As the Commission has previously stated:

> Because the success of the market opening provisions of the 1996 Act depend, to a large extent, on the cooperation of incumbent LECs, including the BOCs, with new entrants and good faith compliance by such LECs with their statutory obligations, evidence that a BOC has engaged in a pattern of discriminatory conduct or disobeying federal and state telecommunications regulations would tend to undermine our confidence that the BOC's local market is, or will remain, open to competition once the BOC has received interLATA authority.

See Application of Ameritech Michigan Pursuant to section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Service in Michigan, Memorandum Opinion and Order, CC Docket No. 97-137, ¶397 (rel. Aug. 19, 1997) ("*Ameritech Order*").

including in-region, interLATA services with its other offerings under a single bill, it will be able to capitalize further on the unfair advantage it has unlawfully secured for itself. The Commission must stop Qwest now and not permit Qwest to profit further from its wrongdoing.

At the very least, Qwest should not be rewarded for continuing to thumb its nose at the restrictions and procedures that are at the core of the 271 process.[11] Nor should Qwest be rewarded for gaming the 271 process as it clearly has: first, by ignoring the strictures of 271 by any means possible by and through its "divestiture relationship" with Touch America; second, by directing and participating in a flawed 271 compliance audit; third, by attempting to force Touch America to litigate both its private rights and public interest rights against Qwest in forums hidden from the Commission's view; and finally, knowingly delaying the possibility of any official decisions on its violative activities until after obtaining 271 approval. Accordingly, the Commission should deny the Application or condition any approval on the outcome of the 271 issues addressed in this Opposition.

It should be noted that Touch America currently has pending two formal complaints against Qwest Communications International Inc., Qwest Communications Corporation and Qwest Corporation in connection with its acquisition of Qwest's in-region, interLATA assets, facilities and customers.[12] The issues raised in this Opposition are amply supported by the

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[11] In addition, Qwest should not be allowed to apply pressure for approval of its Application based on its poor financial circumstances. Special consideration of a BOC's financial position is not contemplated under the Act.

[12] *See* File No. EB-02-MD-003 (alleging Qwest's sale of so-called "Capacity IRUs" are in essence long-distance voice and data telecommunications services that specifically violate section 271) ("*IRU Complaint*") and File No. EB-02-MD-004 (challenging Qwest's compliance with FCC Merger and Divestiture Orders and alleging Qwest has violated or is presently violating sections 201, 202 and section 271 of the Telecommunications Act of 1996, by engaging in unreasonable and discriminatory activities and failing to fully divest its long-distance business (*footnote continued on the next page*)

Affidavits in those proceedings.[13] In fact, many of the issues raised in this Opposition are not contested by Qwest.[14]

The issues in the Touch America complaints are not simply carrier-to-carrier disputes. To the contrary, many of the issues raised in the complaints have a direct bearing on the 271 and public interest concerns at issue in this proceeding, thus requiring the Commission's consideration in this proceeding. Stated differently, the mere fact that Touch America has filed complaints which raise similar issues but for a different purpose does not mean that the Commission can ignore them or that those issues do not impact the issues that the Commission is required to consider under section 271. Deferring the issues raised in this Opposition to the complaint proceedings would therefore be a derogation of the Commission's statutory mandate and responsibility to consider the facts surrounding an Application for 271 authority.

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and cease providing in-region long distance services) ("*Divestiture Complaint*").

13 *See IRU Complaint*, Exhibit B (Dennehy Affidavit – discussing Qwest's disclosure of intentions to market, provision and operate lit fiber IRUs in the 14-state region; discussing Qwest's marketing of lit fiber IRUs; discussing details of the lit fiber IRU agreements), Exhibit C (Tretheway Affidavit – discussing Qwest's disclosure of intentions to market, provision and operate lit fiber IRUs in the 14-state region; discussing Qwest's marketing of lit fiber IRUs; discussing details of the lit fiber IRU agreements), Exhibit H (Ferdowsian Affidavit – discussing Qwest's lit fiber IRU agreement with Winstar), Exhibit L (Burns Affidavit – discussing Qwest's lit fiber IRU agreement with Vulcan NW), Exhibit O (O'Conner Affidavit – discussing Qwest's lit fiber IRU agreement with Verio; discussing Qwest's marketing and provisioning of lit fiber IRUs to Touch America's customer Teleglobe), Exhibit DD (Meldahl Affidavit – discussing Qwest's failure to disclose to Touch America the plans to market, provision and operate lit fiber IRUs to carriers including Touch America).

14 *See infra* n.49.

II. The Commission Should Deny Qwest's Application as a Result of Qwest's Failure to Meet the Requirements of Section 271 and Its Unlawful Entry Into the In-Region, InterLATA Market.

A. The Application of Qwest Fails to Meet the 14 Point Checklist.

1. Qwest Routinely Fails to Meet the Requisite Performance Measurements or to Provide Services or Facilities at Parity.

Qwest's Application is replete with failures to meet the performance indicator definitions ("PIDs") used to measure Qwest's performance. Qwest routinely misses its PIDs 25% of the time. In many instances, Qwest failed to meet the PID requirements 75% of the time and in some instances 100% of the time. For example, it failed 100% of the time to meet the parity requirement for UNE-P POTS installation in Nebraska (no dispatch). Similarly, Qwest failed 100% of the time to meet parity for the UNE-P CENTREX maintenance and repair trouble rate in Colorado, Iowa and North Dakota.

Qwest claims that the Commission should ignore these failings by looking to the "totality of the circumstances," arguing that individual disparities are not dispositive.[15] Yet the individual disparities are what comprise the totality of the circumstances and individual circumstances are what affect CLECs and their customers. Given the many failures on Qwest's part, the totality of the circumstances demonstrates that Qwest has not met its burden under section 271.[16]

Further, many of Qwest's claims in the Application are simply illogical. For instance, in defending its performance under the PIDs, Qwest attempts to justify its compliance with

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15 Qwest Application at 110.

16 Although the Commission has all of Qwest's performance data available for its review, Touch America has attached to these comments – as Exhibit A – a chart of the numerous shortfalls that belie Qwest's attempts to characterize them as insignificant and immaterial.

residential service by pointing to its efforts to comply with standards for commercial services.[17] These claims cannot survive as Qwest is comparing apples with oranges.

2. Qwest Fails to Provide Non-Discriminatory Access to Its Databases, Thereby Impeding the Ability of Competitors to Compete on a Level Playing Field.

Qwest fails to provide Touch America with access to the Qwest databases that it needs to properly service its customers. Just as Qwest has discriminated against Touch America in providing access to databases and software systems required by Touch America, Qwest will certainly have the ability and incentive to discriminate against competitors in the local telecommunications service market.

After Touch America licensed a number of software systems from Qwest, Qwest failed to meet its obligations related to those software systems by failing to provide Touch America with any access to certain systems and by limiting the functions available to Touch America employees for other systems. As a result of Qwest's failures, Touch America was prevented from serving its customers effectively, thereby damaging Touch America's competitiveness in the market and permitting Qwest to retain control of and access to critical data on its purportedly divested customers.

Further, Qwest wrongfully made changes to Touch America's accounts on Touch America's side of the system partition. These unauthorized actions included moving circuits from Touch America accounts to Qwest accounts, causing Touch America to lose the revenue related to the circuit and denying Touch America access to data in the licensed software systems for these circuits. In addition, Qwest made changes to circuits within Touch America accounts

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17 Qwest Application at 125, 127, 129.

to favor Qwest. These changes included giving credits to Qwest on self-proclaimed "corporate communications" accounts provided to Qwest by Touch America or setting these accounts to a zero rate thereby causing Touch America to lose revenue for the affected accounts. Qwest also ordered circuits or disconnected circuits in Touch America accounts without going through Touch America.

As a result of Qwest's refusal to provide Touch America with the access to the databases to which it is entitled, it is more difficult for Touch America to provide accurate, cost-effective, quality services to its customers, as well as to manage its network in a cost effective manner, ultimately to the detriment of in-region, interLATA consumers. For the most part, Qwest has ensured that residential and other switched services customers "see" Touch America as their service provider, though behind the scenes Qwest continues to either perform or frustrate Touch America's ability to perform for itself many of the core functions of a telecommunications carrier. Accordingly, Qwest's behavior since divestiture has placed it in a position of easily "winning back" Touch America's customers who have and will continue to blame Touch America, not Qwest, for their poor service.

Qwest's anti-competitive behavior aimed towards Touch America shows how Qwest intends to treat all competitors in the local and interexchange markets. Qwest will manipulate and deny access to data in the OSS context in the same manner it has manipulated data and denied access to Touch America and will at every turn continue to discriminate against its competitors.

3. Qwest Violates Section 271 Through the Sale of "Lit Capacity IRUs" and Other In-Region, InterLATA Services.

Not only has Qwest failed to cease its 271 prohibited activities, it has stepped up its attempts at an end run around the 271 process through the sale of what it terms as "lit capacity IRUs" and other in-region, interLATA services. Although Qwest admits that it markets and provides so-called "lit capacity IRUs" to carriers and customers enabling those entities to receive in-region, interLATA services from Qwest in contravention of section 271,[18] it argues that they are permissible "telecommunications facilities" and not prohibited in-region, interLATA "telecommunications services."[19] In fact, Qwest has recently offered an analogy that likens the IRUs to unbundled network elements ("UNEs")[20] Apparently not trusting itself with that argument alone, Qwest also likens the IRUs to the permissible transfer of international undersea cable circuits and bare satellite transponder capacity.[21] Qwest further attempts to justify its unlawful behavior by asserting that its "lit capacity IRUs" are facilities with competitive importance "as a potential alternative to constructing one's own facilities."[22] Qwest also claims that the "lit capacity IRUs" "only can be of use to an extremely small number of sophisticated

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18 *See Answer of Defendants Qwest Communications International Inc., Qwest Corporation, and Qwest Communications Corporation*, File No EB-02-MD-003 (filed March 4, 2002) ("Qwest Answer"); *see also*, *e.g.*, *Qwest Response to Washington State Attorney General data request* ATG 06-043*, In the Matter of the Investigation into U S WEST's Compliance with Section 271*, Docket No. UT-003022.

19 This type of shell game is exactly what has caused the SEC to formally investigate Qwest's policies, practices and procedures, including how it accounted for lit capacity and IRUs.

20 *Qwest Answer*, ¶ 112 ("The Commission has also held that incumbent local exchange carriers are required to offer both lit fiber transport capacity and dark fiber as unbundled network elements.").

21 *Qwest Answer* at 7-8 and ¶¶ 95, 110, 112.

22 *Qwest Answer*, ¶ 112.

parties (typically, but not necessarily always, carriers or ISPs) as part of their own network systems"[23]

Regardless of how Qwest tries to characterize or rationalize them, Qwest's "lit capacity IRUs" are nothing more than dedicated private lines. Qwest's attempt to label them as IRUs should not conceal the fact that they are prohibited in-region, interLATA services offered by Qwest in violation of section 271. Moreover, Qwest's argument that the "lit capacity IRUs" are comparable to UNEs raises important issues in the context of this section 271 review. If the Commission determines that Qwest is correct in its position that the "lit capacity IRUs" are akin to UNEs, then the Commission should determine that the state regulatory authorities have a duty under section 271(c)(2)(B)(ii) of the Act to ensure that Qwest offers non-discriminatory access to and pricing for the "lit capacity IRUs" in accordance with sections 251(c)(3) and 252(d)(1) of the Act.[24] In turn, the Commission should reject the Application until those 271 related issues – issues that have a clear and direct impact on the Application – are resolved.

The "lit capacity IRUs" are not the only example of Qwest prematurely providing 271 services. For instance, Qwest offers in-region, interLATA service through the use of voice over Internet protocol and voice over asynchronous transfer mode technologies. In addition, after the merger, Qwest has transported in-region, interLATA traffic of non-affiliated end users. While the service is a prohibited 271 service, Qwest has attempted to avoid detection by designating such traffic as "corporate communications." In other words, Qwest has attempted to avail itself

23 *Qwest Answer*, ¶¶ 83, 169.
24 47 U.S.C. § 271(c)(2)(B)(ii).

of a recognized exception under 271 for "official services" through the euphemism of "corporate communications" in an effort to obtain in-region, interLATA customers and related revenues.[25]

As deferential to Qwest as the 271 compliance audit process to date has been,[26] it too uncovered similar violations that the Commission cannot ignore. In both the 2000 and 2001 audits, Andersen found hundreds of customer accounts involving prohibited in-region, interLATA services that were billed and branded as Qwest services.[27] Although Qwest has asserted that this section 271 violation stemmed from an order entry problem involving services ordered just prior to the merger but provisioned after the merger, neither Qwest nor Arthur Andersen ("Andersen") has explained why these problems have persisted for at least 19 months after the merger or why the number of misbilled and misbranded customers *increased* over time. In other words, rather than showing improvement, the March 2002 Andersen audit reveals that the incidence of Qwest's 271 violations has actually increased of late – a stunning conclusion given the limited scrutiny actually given by Andersen.

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25 *See*, *e.g.*, *Qwest Answer*, ¶¶79, 432.

26 *See infra* section III.C.2, regarding the audit process.

27 In addition, Andersen found:

- Two separate systemic errors leading to significant double billing of customers by Qwest;
- Provisioning by Qwest of in-region, interLATA Internet traffic without payment of the required Global Service Provider ("GSP") charge;
- Failure to maintain all sales agent contracts necessary for the auditor to test whether commissions were paid on joint Qwest/Touch America sales volumes;
- Failure by Qwest to pay an outside provider for prepaid calling cards for in-region interLATA traffic;
- Access by Qwest employees to Touch America customer accounts in a manner that could have enabled the employees to violate the *Merger* and *Divestiture Orders*.

See 2001 and 2002 Audit Reports, *Qwest Answer* at Exhibits 1-2. Unbelievably, the discovery of 271 violative service offerings was, however, deemed immaterial by Andersen. *Id*.

B. Qwest Should Not Be Permitted to Hide Its 271 Prohibited Activities Behind Its Affiliate, or to Discriminate Against Carriers in Violation of Section 272(c) of the Act.

1. *Unlawfully Hiding Behind Its Affiliate*

As a defense and in an effort to avoid responsibility for any unlawful aspect of the "lit capacity IRU" offerings, Qwest claims that its section 272 affiliate, QCC, provides the "lit capacity IRUs."[28] Section 272 of the Act requires that in-region, interLATA services, when offered after receipt of 271 authority, must be offered through a separate affiliate.[29] However, it is premature for Qwest to offer in-region, interLATA services without 271 authority, regardless of the entity used to offer such services. Section 271(a) of the Act explicitly provides that "[n]either a Bell operating company, *nor any affiliate of a Bell operating company*, may provide interLATA services except as provided in this section."[30] Section 271, of course, requires the BOCs to satisfy the 14-point competitive checklist and obtain approval from the Commission before offering in-region, interLATA services.

In this regard, it is significant that an exhibit to the Application provides that "[t]he lease agreement [between Qwest and QCC] for fiber optical capacity was not accounted for, billed (including interest charges) or posted to the website [sic] during the examination period."[31] Although QCC was permitted to retain in-region assets for the provision of lawful services, the failures with respect to disclosure raise issues as to whether QCC engaged in prohibited transactions with Qwest and whether QCC properly accounted for permitted transactions. Were the assets that are used by QCC to provide the "lit capacity IRUs" negotiated for and transferred

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28 *Qwest Answer* at 11.
29 47 U.S.C. § 272(a).
30 47 U.S.C. § 271(a) (Emphasis added).

on an arm's length basis? Were the transfers reduced to writing and made available for public inspection? Were those writings posted to the Qwest Internet site within ten (10) days of the transactions? Have those offerings been made available to other carriers on a non-discriminatory basis?

Moreover, QCC is not merely offering the "lit capacity IRUs" to businesses that would otherwise be the customers of interexchange carriers like Touch America, but in several instances, QCC has actually taken back customers and accounts that were transferred to Touch America pursuant to the *Merger Order* and *Divestiture Order*. While Qwest asserts it transferred the "reclaimed" accounts to Touch America in error, in at least one case, Qwest actively marketed and provisioned the "lit capacity IRU" offerings to a business that was clearly a Touch America customer for private line services.[32]

2. Unlawfully Discriminating Against Carriers

In addition to offering in-region, interLATA services through a separate affiliate, the BOC and affiliate must also comply with a host of protective measures to prevent anti-competitive behavior. Those measures include the nondiscrimination safeguards of section 272(c). Under section 272(c)(1), a BOC must not discriminate between itself or its section 272 affiliate and any other entity "in the provision or procurement of goods, services, facilities, and information, or in the establishment of standards."[33] As the Commission noted in the recent NPRM regarding the sunset of section 272 safeguards, "[t]he purpose of the separate affiliate and nondiscrimination requirements in section 272 is to lessen the ability of a BOC to discriminate

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31 *See Qwest Application*, Exhibit JLB-272-17, Affidavit of Judith L. Brunsting.
32 *See Qwest Answer*, ¶ 75.
33 47 U.S.C. § 272(c)(1).

and/or misallocate costs to the advantage of its own operation, and to make it easier to detect any such behavior."[34] The Commission has determined that "the protection of section 272(c)(1) extends to any good, service, facility, or information that a BOC provides to its section 272 affiliate."[35] More specifically, the Commission "construe[s] the term 'services' to encompass any service the BOC provides to its section 272 affiliate, including the development of new service offerings."[36]

Qwest discriminates against Touch America vis-à-vis QCC in its provision of information regarding long distance services and customers. Qwest provides Touch America with inadequate and discriminatory access to various databases containing, among other things, customer information, billing data, and circuit and facilities identification information. On the other hand, Qwest has access to Touch America customer information, software systems and other databases that Qwest or an affiliate can access or manipulate without Touch America's authorization, consent or knowledge. Furthermore, Qwest (the local exchange carrier) leases dark fiber and transport from QCC while other carriers are unable to obtain the same services at the same rates, terms and conditions. Qwest and QCC have not represented that other carriers will be able to obtain those services on non-discriminatory terms.

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[34] *See In the Matter of Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, FCC 02-148, *Notice of Proposed Rulemaking*, ¶ 14 (rel. May 24, 2002).

[35] *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *First Report and Order*, FCC 96-489 ¶ 218 (rel. Dec. 24, 1996).

[36] *Id.*, ¶ 217.

Although Qwest states in the Application that it "will not discriminate in favor of QCC,"[37] Qwest's activities by and through its 272 affiliate, QCC, demonstrate that Qwest has not and will not comply with section 272. Accordingly, the Commission need not make a "predictive judgment" that Qwest will not comply with section 272.[38] In this instance, the Commission can rely on actual experience to determine that it won't.

III. Approval of Qwest's Application Is Not in the Public Interest.

Commission precedent requires that, in evaluating a 271 application, significant weight be given to a BOC's history of wrongdoing. As the Commission has previously determined, the public interest analysis undertaken by the Commission pursuant to section 271(d)(3)(C) of the Act must include a review of "evidence that a BOC applicant has engaged in discriminatory or other anti-competitive conduct, or failed to comply with state and federal telecommunications regulations."[39] As shown above, Qwest has engaged in a pattern of discriminatory and anti-competitive conduct and repeatedly has disobeyed federal and state telecommunications regulations. Indeed, with its history of unlawful conduct and perennial status as a bad actor, Qwest's "dirty hands" should be dispositive factors requiring the Commission to deny Qwest's Application.[40]

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[37] Qwest Application at 172.

[38] Qwest Application at 168.

[39] *Ameritech Order* at ¶397.

[40] The Commission must consider Qwest's prior conduct in evaluating its 271 Application. *See Applications of Ameritech Corp. and SBC Communications, Inc. For Transfer of Control of Corporations Holding Commission Licenses and Lines*, 14 FCC Rcd 14712, 14948, n.1098 (1999) (citing to "*Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1190 (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992); *MCI Telecommunications Corp.*, 2 FCC Rcd 509 (1998) (stating that character qualifications standards adopted in the broadcast context (*footnote continued on the next page*)

A. Qwest Has Thrice Been Found by the Commission in Violation of Section 271 of the Act.

Since the passage of the Act, Qwest has sought out ways to circumvent the section 271 prohibition against the provision of in-region, interLATA services. In that regard, Qwest has been found guilty of violating section 271 on three occasions – more than all other BOCs combined. For example, prior to their merger, Qwest and U S WEST teamed to offer in-region, interLATA services bundled with local exchange services, in violation of section 271.[41] In the *Teaming Order*, the Commission ruled that U S WEST's arrangement violated section 271 and identified four inherent but unlawful benefits associated with providing in-region customers a long distance component prior to section 271 authorization: (1) strengthening the BOCs' position in the telecommunications marketplace; (2) affording the BOCs a "significant jumpstart" when they do obtain 271 authorization; (3) strengthening "their relationships with their in-region local customers;" and (4) providing "material financial benefits."[42]

In addition to its decision in the *Teaming Order*, the Commission determined on two other occasions that U S WEST was violating section 271 by offering in-region, interLATA services: (1) through the provision of 1-800-4USWEST service[43] and (2) by offering a National Directory Assistance service offering.[44] In each instance, Qwest kept trying to push the envelope in search of avenues to avoid section 271's restrictions and to gain a "significant

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can provide guidance in the common carrier context)").

41 *See Teaming Order*.

42 *Id.* at 28-30.

43 *See In the Matter of AT&T Corp. v. U S WEST Communications, Inc., and MCI Telecommunications Corp. v. U S WEST Communications, Inc.*, File Nos. E-97-28 and E-97-40A, DA 01-418 (rel. Feb. 16, 2001).

44 *See MCI Telecommunications Corp. v. U S WEST Communications, Inc., and MCI Telecommunications Corp. v. Illinois Bell et al.*, Memorandum Opinion and Order, DA 99-2479 (*footnote continued on the next page*)

jumpstart" in the long distance market. In the latest instance, and as shown below, Qwest has done everything in its power to dilute or avoid the divestiture of its in-region, interLATA business.

B. Qwest Failed to Divest Its Long Distance Operations to Touch America, Thereby Violating Section 271.

Although Qwest was required to divest its in-region, interLATA customers to Touch America as part of its merger with U S WEST, Qwest failed to do so. As a result, Qwest has continued to service in-region, interLATA customers and to use the in-region, interLATA facilities that it retained to do so. Such conduct violates section 271.

Touch America has uncovered several other aspects in which Qwest failed to comply with the *Merger Order* and thus operates in violation of section 271. For example, Qwest continues to control assets over which it transmits prohibited 271 services. In some cases, Qwest exercises complete control over assets used to provide in-region, interLATA services – *e.g.*, the "lit capacity IRU" offerings. In other instances, Qwest prevents or limits Touch America's access to and use of switches, electing instead to use those switches to transmit prohibited in-region, interLATA services. Moreover, as explained above, Qwest has abused its access to and control over databases and software systems to prevent Touch America from accessing the information necessary to service its customers. Not only has Qwest used its access to those databases and systems to stymie Touch America's efforts to operate its business, but Qwest has used its continued access to the databases and software systems to self-provision circuits for unlawful in-region, interLATA traffic.

(rel. Nov. 8, 1999).

In yet another display of anti-competitive behavior, Qwest has tied the use of its billing platform to the use of its transport. Specifically, Qwest failed to disclose to Touch America that it had configured the billing services it sold to Touch America in a way that would not allow Touch America to use carriers other than Qwest for out-of-region and terminating in-region, interLATA traffic without being billed by Qwest for those same services. By doing so, Qwest continued until earlier this year to exert control over the routing and pricing of in-region interLATA services and assured itself of a material economic benefit from the in-region, interLATA divested customers.[45] Given Qwest's inability to abide by the law during a time when it should be demonstrating its best behavior, Qwest will undoubtedly step up its discriminatory and anti-competitive efforts once it receives 271 approval.

C. Qwest Is a "Bad Actor."

1. Misrepresentations

On numerous occasions, Qwest has solidified its status as a bad actor. The unlawful activities of Qwest should be sufficient to warrant denial of the 271 Application. However, when one examines the substance and multitude of Qwest's misrepresentations to the Commission, some of which are listed below, the evidence of Qwest's bad character continues to mount.

- Qwest failed to disclose Touch America's lack of access to CPNI of transferred customers or the limitations on Touch America's access to Qwest databases and systems;

- Qwest failed to disclose its use of retained in-region network facilities to transmit interLATA telecommunications via "lit capacity IRUs" and "corporate communications;"

[45] Touch America has recently moved to its own billing platform, which eliminated the problem.

- Qwest represented that it was divesting all prohibited in-region interLATA services and customers and that it would not be performing in-region interLATA transmissions prohibited by 271;

- Qwest represented that, prior to divestiture, all interLATA dedicated circuits with one or both termination points in-region would be reprovisioned to Touch America network facilities; however, Qwest did not do this;

- Qwest represented that Touch America was free to use other off-net providers; however, Qwest failed to disclose to the Commission that it had configured its billing system such that it would be unable to bill transferred customers if Touch America actually purchased services from other off-net providers, thus ensuring that Qwest will receive ongoing revenues associated with the transferred customers and maintaining material economic benefits from the divestiture;

- Qwest represented that Touch America would always perform the core functions of carriers, including retaining ultimate control over its own network; however, Qwest failed to disclose its failure to transfer control of, and its limitation on access to, the voice switches;

- Qwest represented that its only role regarding the switches was monitoring and maintenance, and failed to disclose its use of these in-region voice switches to process Qwest provisioned or controlled in-region traffic.

The Commission cannot ignore Qwest's failure to comply with its full disclosure requirements. Instead, the Commission must consider the impact of Qwest's misrepresentations and failures to disclose as it weighs the evidence in this 271 inquiry.

2. The Tainted Post-merger 271 Compliance Audit

Qwest has also manipulated the section 271 process through its egregious interference with the annual post-merger 271 compliance audits the Commission required in its *Merger* and *Divestiture Orders* to monitor Qwest's ongoing compliance with section 271.[46] The "independent" auditor Qwest hired to fulfill the Commission's mandate – Andersen – was hardly independent of Qwest. Indeed, Andersen served as Qwest's financial auditor. Consequently, Andersen approached the compliance audits as if Qwest, and not the Commission, were its client. Qwest's attorneys (including in-house counsel, its lead counsel in proceedings before this Commission, and its outside litigation counsel) routinely reviewed, revised and commented on Andersen's draft audit reports and supplemental filings, before these reports were filed with the Commission. In other words, the reports this Commission has relied on to ascertain whether Qwest has complied with section 271 and the *Merger* and *Divestiture Orders* were prepared, at least in part, by Qwest and its lawyers. Moreover, Touch America has evidence suggesting that Qwest attempted to pressure Andersen into tailoring the compliance audit reports to suit Qwest's litigation strategy. This evidence verifies Qwest's propensity to unfairly game the regulatory process as a whole and raises serious questions about the integrity of the supposedly independent compliance audit process.

In addition, Touch America has reviewed Andersen's work papers and audit-related correspondence with Qwest from the past two annual compliance audit periods. These documents show Andersen's near-total reliance on Qwest's representations as a basis for the audits' conclusions, and its efforts to "clean up" the work papers presented to the Commission to make the audits appear more probing and independent than in fact they were. Andersen did little more than report the results of tests conceived and executed entirely by Qwest, and when Andersen did verify the information Qwest presented, it rarely sought the type of detail necessary to reveal whether Qwest's assumptions were correct in the first instance.

The evidence also shows Andersen did not always understand the results it reported to the Commission and studiously avoided seeking out information that would have revealed Qwest's

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[46] *See Merger Order*, ¶ 27; *see also Divestiture Order*, ¶ 42.

shortcomings or contradicted Qwest's position regarding its compliance. Even though the Commission granted the auditor full access to Touch America's records and business operations, Andersen never sought information from Touch America as part of its work plan. Finally, when the audits did detect areas of non-compliance, the evidence shows Andersen coordinated with Qwest in an effort to minimize and justify the offense.

In sum, the compliance audits were tainted by Qwest's interference and Andersen's unwillingness to conduct a searching and serious review. At a minimum, before the Application can be granted, the Commission should order a truly independent audit – one that seeks, aggressively and objectively, to test Qwest's claims of compliance; reviews all sources of relevant information; and is conducted by an auditor whose competence and independence from Qwest are beyond question. The audits conducted to date have not come close to meeting these standards.

3. Silencing Its Critics

In addition to controlling the Andersen audits and reports, Qwest found other ways to silence its critics. For instance, as found by state regulatory authorities and as many companies have noted in filings before the Commission, Qwest entered into "secret" agreements with CLECs to silence their objections to Qwest's 271 Application.[47] Specifically, Qwest purported to agree to resolve service disputes with CLECs in exchange for the promise of those CLECs to withdraw from the 271 review proceedings. The agreements, which were not made public, discriminate against carriers by offering better terms and service standards for those CLECs who were willing to drop out of the Qwest 271 dockets. In addition to having an anti-competitive and

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[47] *See supra* n.5, regarding Eschelon's letter and the Minnesota Department of Commerce (*footnote continued on the next page*)

discriminatory impact on competitive carrier operations, the secret CLEC agreements have denied the states and the Commission the opportunity to develop a full and complete record for reviewing Qwest's requests for 271 authority.

D. Qwest Is Unlawfully Gaining a Competitive Advantage.

By engaging in the unlawful activities described in these comments, Qwest undermines the very purpose of section 271. Qwest's premature entry into the long distance market enables it to secure an advantage for itself that has and will continue to hinder the growth of competition in both the long distance and local service markets. As a result, both competitors and consumers will be harmed if the Commission approves the Application.

In particular, since many customers prefer to receive "bundled" services – *i.e.*, one bill for local, long distance and data services, Qwest's unfair advantage in the long distance market enables it to attract or retain local customers, to the detriment of local and long distance competitors of voice and data services and the future of competition in those markets.[48] In addition, through the unlawful provision of in-region, interLATA services, Qwest is able to solidify its relationships with its local and long distance customers.

IV. If the Commission Approves the Application, Such Approval Should be Conditioned to Ensure a Competitive Marketplace.

For the reasons set forth above, Touch America urges the Commission to deny Qwest's Application or, in the alternative, to delay any approval of the Application until the resolution of the 271 related issues raised in this Opposition. Given the fact that Touch America has alleged

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complaint addressing Qwest's "secret" CLEC agreements.

[48] This ability to provide vertical services is the very leverage purposely designed by Congress to ensure the opening of competitive markets under section 271. Yet Qwest has unlawfully grabbed it.

facts that support clear violations of section 271 – and, in many instances, Qwest has not contested those 271 related allegations[49] – the Commission should not act on the Application until these matters are resolved.

As the Commission found in connection with Verizon's application for approval to provide in-region, interLATA services in the State of New Jersey, where Verizon had engaged in premature marketing of its long distance service, potential violations of federal telecommunications law are relevant to the section 271 inquiry.[50] In that matter, the Commission cautioned, that "BOCs should not market long distance service in an in-region state prior to receiving section 271 approval from the Commission for that particular state and we remind Verizon and all BOCs to exercise caution in this regard."[51] However, unlike Qwest, which has refused to remedy its violations and continues to provide prohibited in-region, interLATA services, the Commission found that Verizon took immediate and effective corrective actions to come into compliance with section 271. Since Qwest has refused to take

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[49] For example, Qwest readily admits that it provides the lit fiber IRUs in question and that the IRUs are used for transmission of services that cross Qwest LATA boundaries. *See Amended Answer of Defendants Qwest Communication International Inc., Qwest Corporation and Qwest Communications Corporation*, File No. EB-02-MD-003, at 5-6 (March 13, 2002) *("Qwest Answer to IRU Complaint")*. In addition, Qwest has conceded specific information about the IRUs, including the fact that the customer obtains only a leasehold interest in the lit fiber. *See Qwest Answer to IRU Complaint*, ¶¶ 142, 145. Further, Qwest admits that Touch America end user accounts were billed under Qwest's name. *See Answer of Defendants Qwest Communication International Inc., Qwest Corporation and Qwest Communications Corporation*, File No. EB-02-MD-004, ¶ 334 *("Qwest Answer to Divestiture Complaint")*. Qwest also admits that it retained and used much of the capacity on the switches it purportedly licensed to Touch America. *Id.*, ¶ 284.

[50] *In the Matter of Application by Verizon New Jersey, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc. and Verizon Select Services Inc. for Authorization to Provide In-Region, InterLATA Services in New Jersey*, WC Docket No. 02-67, Memorandum Opinion and Order, FCC 02-189 at ¶190(rel. June 24, 2002).

this course in this matter, the Commission must deny the Application or, at a minimum, first hear and resolve the 271 related issues addressed in this Opposition.

If the Commission determines (in Touch America's view incorrectly) that it must proceed with the Application, notwithstanding all the evidence surrounding Qwest's unlawful conduct as well as its "dirty hands," the Commission should do so only after Qwest satisfies conditions necessary to ensure Qwest's future compliance with sections 271 and 272. First, the Commission should require Qwest to divest itself of all the in-region, interLATA customer accounts that should have been divested at the time of the merger with U S WEST. Qwest must be required to account for customers that should have been divested and certify to the Commission the manner in which each is rightfully divested. In addition, and as proposed earlier, in light of Qwest's penchant for gaming the audit process, the Commission should require a genuine and comprehensive audit of the corrective actions taken by Qwest in divesting such customer accounts. The audit process must be truly independent, and not permit Qwest to direct the results of the audit.

The Commission should also closely monitor Qwest's "win back" activities for discriminatory conduct. The Commission should impose conditions on the manner in which Qwest is permitted to try to "win back" long distance customers from Touch America and other long distance carriers as well as local carriers and require Qwest to report, on a quarterly basis, its marketing initiatives related to "winning back" local and long distance customers and the success of such initiatives.

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[51] *Id*.

The "win back" restrictions imposed by certain state regulatory commissions in response to the anti-competitive efforts of the BOCs to regain local exchange service customers could be used as a basis for Qwest "win back" restrictions. For instance, to the extent the Commission requires Qwest to properly divest its in-region, interLATA customers prior to approval of its Application, Qwest should be barred from marketing its long distance services to the newly divested customers for a certain period of time after proper divestiture.[52] Touch America proposes a 120-day standstill requirement to give other carriers a chance to compete for that business. Qwest must also be barred from using its access to customer information that is not provided at parity to competitors to gain, or regain, any long distance customers.[53] That is, QCC will be in the position of being able to obtain from Qwest customer information about service provider changes on a more expedient basis than Qwest provides such information to its competitors, and to use such information to extensively market to gain or regain such customers. QCC should not be permitted such superior access to information or to exploit such access to the detriment of other competitors. Finally, Qwest should be prohibited from engaging in "off tariff" marketing schemes to try to win back divested customers or customers lost to other carriers.[54]

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52 *See, e.g., In Re Investigation of BellSouth Telecommunications "Win back" Activities*, Interim Order, Georgia Public Service Commission, Docket No. 14232-U (July 23, 2001).

53 *See, e.g., Z-Tel Communications, Inc. v. Illinois Bell Telephone Company, d/b/a Ameritech Illinois*, Illinois Commerce Commission Docket 02-0160, *Interim Order* (Feb. 27, 2002), *Amendatory Order* (March 13, 2002) and *Order* (May 8, 2002) (prohibiting Ameritech from providing faulty line loss notification to Z-Tel while, at the same time, using more favorable line loss information to market to Z-Tel's customers).

54 In Re *Complaint of XO Tennessee, Inc. and Complaint of Access Integrated Networks, Inc. Against Bellsouth Telecommunications, Inc.*, Docket No. 01-00868, *Hearing Officer's Initial Order* (April 16, 2002) (fining BellSouth for offering a non-tariffed rebate program to select customers in Tennessee).

Given how easily customers may be lost to an unfair marketing scheme by Qwest, the Commission's standard complaint procedures may not provide harmed carriers the immediate relief they need. The Commission should therefore establish a process whereby any continuing violations by Qwest, including complaints related to the win back of customers by Qwest, will be resolved quickly and fairly by the Commission. For instance, and for a period of time made necessary by Qwest's prior acts, the Commission could designate a team in the Enforcement Bureau tasked with hearing and quickly resolving legitimate inter-carrier complaints related to Qwest's activities. Although such a remedy may not be standard in these types of proceedings, such a step is necessary in this instance given Qwest's history of side-stepping the rules and its singular efforts to "park" customers until receiving 271 approval by engaging in unlawful conduct.

In order to prevent Qwest from backsliding after any 271 approval is granted, the Commission should take steps to ensure that Qwest's proposed performance assurance plan (referred to as the "QPAP") includes sufficient monitoring and remedies to address current and future anti-competitive actions of Qwest. As part of a public interest determination of a 271 application, the Commission has looked at whether "a BOC would continue to satisfy the requirements of section 271 after entering the long distance market."[55] In doing so, the Commission has determined that effective performance monitoring and enforcement mechanisms (*i.e.*, a performance assurance plan) would constitute probative evidence as to

[55] *In the Matter of Application of SBC Communications, Inc., Southwestern Bell Telephone Company and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65 at ¶ 420 (rel. June 30, 2000).

whether the public interest is being met.[56] Qwest should therefore be considered as proffering its QPAP in an effort to assure the Commission that it would continue adhering to those requirements of section 271 post-entry.

[56] *Id*.

However, since Qwest has failed to comply with the 271 restrictions prior to even applying for 271 authority, its QPAP must be looked at with a wary eye. Given Qwest's repeated and continual subterfuge of the 271 process and the prohibition against in-region, interLATA services, the performance assurance plan and its enforcement must be as "air tight" as possible to ensure that Qwest is given no opportunity to backslide on its obligations to competitors. The Commission must ensure, for instance, that the QPAP adequately guards against Qwest providing its competitors discriminatory access to its databases or billing processes. The Commission must make clear that it has the right, if future events require, to modify the QPAP to ensure that Qwest is meeting its obligations to its competitors. For instance, the Commission must maintain unilateral Commission or state regulatory authority change control over any part of the QPAP, regardless of whether Qwest agrees with the change or not.[57]

Finally, the Commission should establish a genuine audit process to monitor the post-relief actions of Qwest, including a complete review of Qwest's provision of access to databases and its billing processes. As set forth herein, Qwest fails to provide non-discriminatory access to the databases that competitors need in order to compete and contrives its billing processes in

[57] This requirement is particularly important in light of the fact that, during the state 271 proceedings, Qwest took the position that its offering of the QPAP was voluntary and not required as a condition for 271 approval and, therefore, that Qwest could veto any regulatory-mandated change to the plan. Clearly, if the Commission or a state regulatory authority finds that the QPAP should be expanded to monitor continued or future anti-competitive conduct by Qwest, the Commission or the state regulatory authority has the power – indeed, the obligation – to do so. The Commission should make this right eminently clear to Qwest.

such a way as to not only hold competitors hostage to its own services but to impede any reasonable tracking or management of costs of services. For example, with respect to its databases, while Qwest denied Touch America access or rights to certain Qwest databases and systems – databases and systems to which Qwest was required to provide Touch America access – Qwest manipulated the data in the same systems to essentially move circuits and revenue from Touch America to Qwest. Qwest also misused its billing processes to delay rendering bills to Touch America, impeding Touch America's ability to manage its costs and operations and then delivered bills of such magnitude with no reasonable means for Touch America to reconcile them with its own data. Such conduct can certainly be replicated with respect to the OSS databases, billing systems and other elements of the local exchange network. A genuine post-271 audit process that investigates and identifies such anti-competitive conduct is therefore needed. Qwest has shown that it cannot be trusted and therefore stops must be put in place to closely monitor its activities and prevent any future anti-competitive activities.

V. Conclusion

Qwest has provided no credible support to demonstrate that it has met the requirements of section 271. Indeed, the evidence against Qwest overwhelmingly points to the conclusion that approval of the Application is contrary to the public interest and the future competitive environment in the local exchange and long distance markets in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota. The Commission should therefore reject the Application or, alternatively, condition approval of the Application on the resolution of the 271 issues raised by this Opposition. In the event the Commission determines not to reject or conditionally approve the Application, the Commission must takes steps to sufficiently address Qwest's predilection towards unlawful conduct in its efforts to gain an unfair advantage in the long distance and local exchange markets.

Respectfully submitted,

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ATTORNEYS FOR TOUCH AMERICA, INC.

July 3, 2002

Exhibit A

Checklist Items	Disparities
Item 1: Interconnection **(a) Trunk Provisioning**	
Delay for non-facility reasons	Idaho – failed to meet parity in 1 of 4 months or 25% of the time.
Average installation interval	Iowa – failed to meet parity in 1 of 4 months or 25% of the time.
(b) Trunk Repair	
Trouble report rate	Idaho – failed to meet parity in 2 of 4 months or 50% of the time. Iowa – failed to meet parity in 3 of 4 months or 75% of the time. North Dakota – failed to meet parity in 1 of 4 months or 25% of the time.
Mean time to restore service	Idaho – failed to meet parity in 2 of 4 months or 50% of the time.
Item 2: Access to Network Elements – Provisioning UNE-P in accordance with negotiated metrics	
(a) UNE-P-POTS Installation	
Delay for non-facility reason	Colorado – failed to meet parity in 1 of 4 months or 25% of the time.
Installation interval	Idaho – failed to meet parity in 1 of 4 months or 25% of the time. Iowa – 2 disparities between wholesale and retail performance Nebraska – failed to meet parity in all 4 months or 100% of the time for installations that did not require dispatch. North Dakota – failed to meet parity in 1 of 4 months or 25% of the time.
Installation quality	Idaho – failed to meet parity in 1 of 4 months or 25% of the time.
General	Of 36 performance measures, failed to meet parity as follows: Colorado – 1 case Idaho – 3 cases Iowa – 2 cases Nebraska - 4 cases North Dakota – 1 case
(b) UNE-P-POTS Maintenance and Repair	
Trouble rate	North Dakota – failed to meet parity in 1 of 4 months or 25% of the time.

Checklist Items	Disparities
Repair repeat trouble report rate	Colorado – multiple disparities for non-dispatch orders and failed to meet parity in 3 of 4 months or 75% of the time. Idaho – failed to meet parity in 1 of 4 months or 25% of the time for repeat trouble reports for non-dispatch orders. Iowa – failed to meet parity in 1 of 4 months or 25% of the time for orders requiring dispatch and in 2 of 4 months or 50% of the time for orders not requiring dispatch.
Other repair performance measures (except for trouble rate)	Nebraska – failed to meet parity in 1 of 4 months or 25% of the time. North Dakota – failed to meet parity in 1 of 4 months or 25% of the time.
General	Of 44 performance measures, failed to meet parity as follows: Colorado – 3 cases Idaho – 1 case Iowa – 3 cases Nebraska – 2 cases North Dakota – 4 cases
(c) UNE-P-CENTREX installation	
Installation commitments met	North Dakota – failed to meet parity in 1 of 4 months or 25% of the time.
Average installation interval	Colorado – failed to meet parity in 2 of 4 months or 25% of the time. Iowa – failed to meet parity in 1 of 4 months or 25% of the time for orders without dispatch.
Installation service quality	North Dakota – failed to meet parity in all 4 months or 100% of the time.
General	Of 36 performance measures, failed to meet parity as follows: Colorado – 2 cases Iowa – 1 case North Dakota – 6 cases Idaho – No Data Nebraska – No Data
(d) UNE-P-CENTREX maintenance and repair	
Trouble rate	Colorado – failed to meet parity in all 4 months or 100% of the time. Iowa – failed to meet parity in all 4 months or 100% of the time. North Dakota – failed to meet parity in all 4 months or 100% of the time.

Checklist Items	Disparities
Repeat repair report rate	Colorado – failed to meet parity in 3 of 4 months or 75% of the time for orders not requiring dispatch.
General	Of 44 performance measures, failed to meet parity as follows: Colorado – 5 cases Iowa – 4 cases North Dakota – 4 cases Idaho – No Data Nebraska – No Data
EELs	Colorado is the only state with performance results for EELs. ROC set a benchmark of 90% for installation commitments met and Qwest was generally in the 75-80% range. Data for EELs considered to be inconclusive.
Item 4: Loops	
(a) Analog Loop Installation, both new loops and hot-cuts (installation commitments met, average installation interval, installation service quality)	Nebraska -- Failed to meet benchmark for average installation interval in 2 of 4 months, and 4 month average was below the benchmark. Also failed to meet installation commitments met benchmark for 2 of 4 months. Also failed to meet parity on 4 installation measures for analog loop installation in 4 month period.
(b) xDSL Loops	Iowa -- Failed to meet parity in 1 of 4 months or 25% of the time for new service installation quality for ISDN-capable loops. Also failed to meet installation commitments met benchmark in 3 of 4 months or 75% of the time for conditioned loops, and in 3 of 4 months or 75% of the time for trouble rate for ISDN-capable loops. For 2-wire non-loaded loops, also recorded disparities in repeat repair report rate and mean time to restore, and failed to meet parity in 1 of 4 months or 25% of the time under all maintenance and repair PID. Nebraska – For conditioned loops, failed to meet installation commitments met benchmark in 2 of 4 months or 50% of the time. Also, recorded a performance disparity in mean time to restore in 1 of 4 months or 25% of the time for 2-wire non-loaded loops. For ISDN-capable loops, failed to meet parity in 1 of 4 months or 25% of the time for repair trouble rate, in 1 of 4 months or 25% of the time for repair trouble rate, and in 1 of 4 months or 25% of the time for mean time to restore and repair repeat report rate. North Dakota -- No "significant" performance disparities under installation or maintenance and repair measures. For conditioned loops, failed to meet benchmark for installation interval in 2 of 3 months or 66% of the time, and 100% of the time for installation commitments met.
(c) High Capacity Loops	Colorado – failed to meet parity 1 of 4 months or 25% of the time on the trouble rate. On all other high-capacity maintenance measures, failed to meet parity 3 of 4 months or 75% of the time. Nebraska -- Failed to meet performance standard for maintenance and repair trouble rate once in 4 months, and failed to meet parity in 1 of 4 months.

Checklist Items	Disparities
(d) Subloops	Colorado – Failed to meet installation commitments in 1 of 4 months or 25% of the time.
(e) Line Sharing Maintenance and Repair	Nebraska – No Data North Dakota – No Data
Trouble rate	Colorado – failed to meet parity in 2 of 4 months or 50% of the time.
Clearing troubles	Iowa – failed to clear one out-of-service trouble report
Percentage of all troubles cleared and mean time to restore	Colorado – "often outside of parity"
Item 5: Unbundled Local Transport and Dark Fiber	
(a) Dedicated Transport	
Average installation interval	Colorado – failed to meet parity in 1 of 4 months or 25% of the time for DS-1s.
Installation quality	Iowa – failed to meet parity in 1 of 4 months for DS-1s and Ds-3s.
Mean time to repair	Colorado – failed to meet parity in 2 of 4 months or 50% of the time for DS-3s.
Trouble rate	Colorado – failed to meet parity in 2 of 4 months or 50% of the time for DS-3s.
Item 13: Reciprocal Compensation	Colorado – two exceptions Idaho – one exception Nebraska – one exception North Dakota – one exception
Checklist Item 14: Resale	Failed to meet parity in all states for some resale performance indicators
OSS	General -- Qwest failed to resolve 1 "Observation" and 14 "Exceptions" to KPMG's OSS testing. Of 685 evaluation criteria that could be evaluated, Qwest failed to satisfy 11.
(a) Ordering	
Confirmation Notices	"Minor" exceptions to PIDs for sending of confirmation notices with one closed/unresolved Exception.
Completion Notices	"Minor" exceptions to meeting benchmark for returning completion notices for IMA-EDI.

Checklist Items	Disparities
Jeopardy Notices • Average number of days provides jeopardy notice in advance of order due date • % of late orders for which it provides such advance notice	Colorado -- failed to meet parity for Non-Designed Services in 2 of 4 months or 50% of the time. Failed to meet parity in certain months for some services (Non-Designed Services, Unbundled Loops LIS Trunks, and UNE-P). KPMG "unable to determine" whether issued timely jeopardy notices for resale and UNE-P, because no such notices were required during evaluation period.
Flow-Through Rate	"Generally" met required benchmarks in all states. Recorded flow-through rates from 83.57% to 100% for flow-through eligible resale, unbundled loop, LNP and UNE-P LSRs received via IMA-EDI and the IMA-GUI. In other words, flow through rates could be off by as much as 16.43% (100% - 83.57%).
(b) Provisioning	Failed to satisfy a test requirement in 4 cases.
(c) Maintenance and Repair	Four "exceptions" were closed/unresolved during KPMG test.
(d) Billing	Failed to provide timely daily usage reports in one instance. Failed to render accurate bills to CLECs in "a few" cases. Failed to meet parity for complete and timely bills as follows: Colorado -- 3 of 4 months Idaho – 2 of 4 months Iowa – 3 of 4 months Nebraska – 1 of 4 months North Dakota – 2 of 4 months
Change Management and Technical Assistance	
(a) EDI Interface	Failed to satisfy the KPMG EDI interface evaluation criterion for whether "a functional test environment is made available to customers for all supported interfaces." There are two closed unresolved Exceptions.
(b) Timeliness of Qwest's release notifications for specified OSS interfaces, including EDI	Failed to satisfy in 1 of 4 months or 25% of the time.
(c) Technical assistance	Failed to satisfy all relevant criteria for technical assistance for timeliness of responses to customer calls to Qwest's systems help desk.
(d) Change Management Process	KPMG classified 7 of 18 test criteria "unable to determine"